BERNARD N. AND NOBEL R. FRIEND

IBLA 74-102 Decided March 20, 1974

Appeal from decision of Acting District Manager, Canon City, Colorado, District Office, Bureau of Land Management, rejecting a grazing lease application conflicting with a renewal grazing lease application.

Affirmed.

Grazing Leases: Applications--Grazing Leases: Renewal

> A Bureau of Land Management decision in favor of renewal of a grazing lease and the denial of a conflicting application will not be disturbed where both applicants are on a parity as to all regulatory criteria except historical use and there are no convincing reasons warranting a change of the lessee of 35 years.

APPEARANCES: Bernard N. and Nobel R. Friend, pro se.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Bernard N. and Nobel R. Friend have appealed the July 24, 1973, decision of the Canon City, Colorado, Acting District Manager, Bureau of Land Management, which rejected their application filed July 17, 1973, for a grazing lease for a 2,143.30-acre parcel within grazing lease Colorado 07778 expiring August 11, 1973, in favor of a renewal application by the lessee, Green's Gulch Grazing Association. 1/ The latter will hereinafter be referred to as the Grazing Association.

1/ Green's Gulch Grazing Association was not named as an adverse party who must be served with a copy of the appeal. Where there are conflicting applicants for grazing privileges, the applicant who is awarded the privileges should be named as an adverse party so he will be served with the appeal documents and afforded an opportunity to answer if he desires.

Both applications were filed pursuant to section 15 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315m (1970). The Grazing Association's renewal application included the entire 3,456.46 acres within its lease. The Acting Manager considered the matter of division of the lands in conflict from the larger area in the renewal application and concluded:

> A division of the area * * * [under the provisions of 43 CFR 4121.2- 1(d)(1)] * * * would require construction of a fence. To divide the area and construct a fence would result in improper utilization of the area by livestock, impede wildlife movement, and limit the opportunity to apply intensive grazing management to the area. Thus, only one applicant will be entitled to the grazing lease for the * * * land.

He stated that certain factors are to be considered as a basis for allocating the use of public land, as provided in 43 CFR 4121.2-1(d)(2):

> (i) Historical use, (ii) proper range management and use of water for livestock, (iii) proper use of preference lands, (iv) general needs of the applicants, (v) topography, (vi) public ingress and egress across preference lands * * *.

He then found that all factors appear to be equal for both applicants except that of historical use. On the basis of absence of historical use, appellants' grazing lease application was rejected in its entirety.

With respect to the historical use factor, the record shows that lands described in appellants' application, among other lands, have been under lease for 35 years to the Grazing Association.

Appellants assert four reasons for their appeal. First, they contend that none of the Grazing Association's land is "contingent" or adjacent to the land described in appellants' application, but that their lands are so adjacent.

There is no merit to this contention. The Grazing Association's application is for the renewal of a grazing lease for lands embracing a large compact block of land within which each smallest legal subdivision adjoins or contacts an adjacent legal subdivision on one or more sides. The Grazing Association owns or controls land contiguous or adjacent on the north side of the tract. In such circumstances, the preference right to lease, conferred by 43 CFR 4121.2-1(c) upon an applicant who owns or controls land contiguous

to the lands sought for leasing, extends to each and every legal subdivision within the perimeter of the compact block of land no matter how remote a particular legal subdivision within that tract may be from the privately owned or controlled lands of the applicant.

Second, appellants state that "[n]either of those 2 ranches" of the Grazing Association "have any irrigation ditches on this land. We have several ditches." They allege that when cattle of the Grazing Association graze "this area, we have to patrol, repair, and maintain these ditches continuously, even then their cattle cause large washouts."

Third, they deny that a new fence would have to be constructed to contain their own cattle, in that:

> There is a natural high, rocky ridge dividing the part of the lease we applied for from the other part. Any new fence constructed would be to control other men's cattle. We would keep our cattle on our part of the lease. We have built some new fences around our land, but it still does not keep the cattle separated from us.

Finally, they assert that the grazing of their cattle would not interfere or compete with wildlife in that their cattle would graze a short time in the spring during April and May on last summer's growth of grass. This they contend would leave all the new growth for wildlife or to grow to improve the land. They allege that the new grass has been grazed in late spring and summer by the Grazing Association's cattle and it was not there for wildlife use and "to catch and hold snow in the winter."

Appellants seem to imply that the foregoing reasons, and, in addition, recognition of good management for many years on another parcel of public land under grazing lease to one of the appellants dictate that the disputed 2,143.30 acres be leased to them.

The regulatory allocative factors set out by the Acting District Manager, and quoted above, must be considered. The allocation may be made on the basis of any or all of the factors listed in the regulation.

As previously stated, the Grazing Association has held the lease to the disputed lands, among other lands, for 35 years. It has been held that if proper range management will be served by awarding the lease to either of the conflicting applicants, there should be no change from the long-time user to a new applicant unless there are convincing reasons to support the change. Victor Powers and Florence Sellers, 5 IBLA 197 (1972); John Ringheim, 10 IBLA 270 (1973).

We find no such reasons here. Appellant's argument that a division of the land would not require the construction of a new fence as they would keep their cattle on their part of the land, and any new fence would serve only to control the cattle of other people, is not convincing. We find more persuasive the Acting Manager's conclusions that a division of the area and the construction of a fence would result in improper utilization of the area by livestock, impede wildlife movement, and limit opportunity to apply intensive grazing management to the area.

As the decision appealed from was predicated upon historical use after finding that the conflicting applicants are on a parity as to all of the other regulatory criteria, and, since we find no convincing reason to disturb that decision, the rejection of appellants' grazing lease application is sustained.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Edward W. Stuebing
Administrative Judge